

DEPARTMENT OF ENVIRONMENTAL QUALITY

AGENCY POLICY STATEMENT NO. 1-2011

SUBJECT: Virginia Freedom of Information Act Compliance

REFERENCE: Virginia Freedom of Information Act (§ 2.2-3700 et seq.)

EFFECTIVE DATE: October 27, 2011



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I. PURPOSE:

This policy establishes procedures for assisting employees of the Department of Environmental Quality (hereinafter "DEQ") in complying with requests pursuant to the Virginia Freedom of Information Act (VFOIA); see www.deq.virginia.gov/info/foia.html. It is intended for use in conjunction with the VFOIA. The entire VFOIA, searchable as one file, can be found at <http://www.foiacouncil.dls.virginia.gov>.

II. BACKGROUND:

The VFOIA gives the people of the Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies in which the business of the people is conducted. Such access is provided to any citizen of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth according to the provisions of the law, regardless of the reason for the request (collectively, "citizens"). The provisions of the law will be liberally construed to promote an increased awareness by citizens of governmental activities and to afford every opportunity for citizens to witness the operations of government. Any exception or exemption from applicability shall be narrowly construed. In compliance with the VFOIA statute, DEQ will treat every written, electronic or oral request for records as a request under the VFOIA, whether or not that law is explicitly cited in the request. The VFOIA does not apply to requests made by individuals who are not citizens of the Commonwealth of Virginia. However, DEQ will make every attempt to honor such requests from outside the Commonwealth within a reasonable time.

Whenever the General Assembly amends the VFOIA so that any portion of this policy is inconsistent with the amended law, this policy will be interpreted in a way consistent with the amended law. The responsibility for interpreting the provisions of these procedures belongs to the DEQ FOIA Officer in consultation with the Director of DEQ (hereinafter "the Director").

When records are requested from a public body pursuant to a subpoena, the Rules of the Supreme Court of Virginia, not VFOIA, apply. (Virginia Freedom of Information Advisory Council AO-05-03)

III. STATEMENT OF POLICY:

DEQ is committed to ensuring that Virginia citizens have access to all agency information to which they are entitled under the VFOIA. We understand that an informed public can better assist us in our mission to protect and improve the environment for the well being of all Virginians. Following are the details on how this policy is implemented.

IV. REQUIREMENTS:

A. What must be disclosed:

1. Except for certain types of records explained in the following subsections or as otherwise provided by law, all records held by DEQ staff pertaining to DEQ business are considered official government records (“public records”) and are subject to mandatory disclosure under the VFOIA. Such records include but are not limited to the following: books, papers, letters, notes, data and databases, presentations, reports, forms, documents, meeting minutes, video and audio records, telephone logs, electronic mail transmissions, electronic data and databases, contracts, position descriptions, job classifications, payment records,¹ maps, charts, diagrams, or graphs. Any version of any such record, whether preliminary or final (*including drafts*), shall be disclosed upon request. Such records may exist in any format, including but not limited to print, handwriting, facsimile transmission, photocopy, electronic computer file, film, audiotape, videotape, photograph, or transparency. Records that are not prepared for or used in the transaction of public business are not public records. Business emails are handled under the same retention policies as other public records.

2. In some instances, the Code specifically requires that certain information always be made available to the public on request. Such information includes:

a. “Emissions data” as provided in §§ 10.1-1314 and 10.1-1314.1 means the information gathered by, or submitted to, DEQ regarding the amount of pollutants emitted by sources of air pollution;

b. “Effluent data” as provided in § 62.44.21 means the information gathered by, or submitted to, DEQ regarding the amount of pollutants emitted by sources of water pollution; and

c. Any other information required by law to be made available to the public.

B. What may be disclosed or withheld:

Certain records are not subject to mandatory disclosure under the VFOIA. These may be disclosed or withheld at the discretion of the custodian of the requested records after consultation with the DEQ FOIA Officer. If necessary, the DEQ FOIA

¹ These include records of salaries for employees earning more than \$10,000 per year, per diem allowances, and reimbursement of expenses.

Officer will consult with the Director, or his designee, and the Office of the Attorney General (OAG) to determine the appropriate course of action.

Exclusions of general application to public bodies (§ 2.2-3705.1):

1. Personnel records containing information about identifiable individuals (§ 2.2-3705.1 (1));
2. Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies and any other records protected by the attorney-client privilege (§ 2.2-3705.1-(2));²
3. Legal memoranda and other work products compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter which is properly the subject of a closed meeting under § 2.2-3711 (§ 2.2-3705.1(3));³
4. Any test or examination used, administered, or prepared for purposes of evaluation of any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion with DEQ, or qualifications for any license or certificate issued by DEQ (§ 2.2-3705.1-(4));⁴
5. Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711 (§ 2.2-3705.1(5));
6. Vendor proprietary information software (§ 2.2-3705.1(6));
7. Computer software developed by or for a state agency (§ 2.2-3705.1(7)); and

² Such writings include (1) records (letters, memoranda, notes of meetings and telephone calls) in which DEQ personnel seek legal advice from the OAG, (2) any written advice received and (3) internal documents reflecting either such written advice or any oral advice received. Records may not be protected by the attorney-client privilege if they have been disclosed to third parties. The attorney-client privilege belongs to DEQ, not to the attorney, and can be waived through disclosure by the client to others. Questions about the application of the attorney-client privilege should be referred to the DEQ FOIA officer who will, if necessary, contact the OAG.

³ This section includes, but is not limited to, any document specifically prepared at the request of the OAG.

⁴ The scoring key or any other document that would jeopardize the security of the test is also exempt from mandatory disclosure. Test scores, however, shall be disclosed. Any person who has taken an employment test shall be entitled to inspect all documents relative to his or her performance on the test.

8. Appraisals and cost estimates of real property subject to a proposed purchase, sale, or lease, prior to the completion of such transaction (§ 2.2-3705.1(8)).

Exclusions relating to public safety (§ 2.2-3705.2):

1. Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the building code in obtaining a building permit which would identify specific trade secrets or other information, the disclosure of which would be harmful to the competitive position of the owner or lessee. Such information shall be exempt only until the building is completed and information relating to safety or environmental soundness of any building shall not be exempt from disclosure (§ 2.2-3705.2(2));

2. Documentation or other information which describes the design, function, operation, or access control features of any manual or automated security system which is used to control access to or use of any automated data processing or telecommunications system (§ 2.2-3705.2(3)); and

3. Plans and information to prevent or respond to terrorist activity, the disclosure of which would jeopardize the safety of any person, including (i) critical infrastructure sector or structural components; (ii) vulnerability assessments, operational, procedural, transportation, and tactical planning or training manuals, and staff meeting minutes or other records; and (iii) engineering or architectural records, or records containing information derived from such records. The same categories of records of any governmental or nongovernmental person or entity submitted to a public body for the purpose of antiterrorism response planning may be withheld from disclosure if such person or entity in writing (a) invokes the protection of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records is necessary to meet the objective of antiterrorism planning and protection (§ 2.2-3705.2(4)).

Exclusions relating to administrative investigations (§ 2.2-3705.3):

1. Investigator notes, correspondence, and information furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resources Management. However, nothing in this section shall prohibit the disclosure of information taken from inactive reports in a form which does not reveal the identity of charging parties, persons supplying the information, or other individuals involved in the investigation (§ 2.2-3705.3(3));

2. Investigative notes, correspondence, and information furnished in confidence with respect to an investigation or conciliation process involving an alleged

unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) (§ 2.2-3705.3(5)); and

#3 becomes effective July 2012

3. Investigative notes, correspondence, and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute provided by or for the (i) Auditor of Public Accounts; (ii) Joint Legislative Audit and Review Commission; or (iii) Office of the State Inspector General with respect to an investigation initiated through the State Employee Fraud, Waste and Abuse Hotline (§ 2.2-3705.3(7)).

Exclusions relating to educational records and certain records of educational institutions (§ 2.2-3705.4):

1. Data, records, or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education in the conduct of or as a result of study or research on medical, scientific, technical, or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records, or information has not been publicly released, published, copyrighted, or patented (§ 2.2-3705.4(4)).

Exclusions relating to proprietary records and trade secrets (§ 2.2-3705.6):

1. Financial statements not publicly available that are filed with applications for industrial development financing in accordance with Chapter 49 (§ 15.2-4900 et seq.)(§ 2.2-3705.6(2)); and

2. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992 (§ 2.2-3705.6(4));⁵

3. Documents and other information of a proprietary nature furnished by an agricultural landowner or operator to the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Agriculture and Consumer Services or any political subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when required as part of a state or federal regulatory enforcement action.

Exclusions regarding records of specific public bodies and certain other limited exemptions (§ 2.2-3705.7):

1. Working papers and correspondence of the Office of the Governor, Lieutenant Governor, the Attorney General; the members of the General Assembly or

⁵ A 1992 amendment deleted "authorized disclosure" and "confidential information."

the Division of Legislative Services; the mayor or other chief executive officer of any political subdivision of the Commonwealth, or the president or other chief executive officer of any public institution of higher education in Virginia. However, no record, which is otherwise open to inspection under this chapter, shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence (§ 2.2-3705.7(2));

2. Records regarding the siting of hazardous waste facilities, except as provided in § 10.1-1441, if disclosure would have a detrimental effect upon the negotiating position of a governing body or on the establishment of the terms, conditions, and provisions of the siting agreement (§ 2.2-3705.7(9));

3. Records containing information on the site-specific location of rare, threatened, endangered, or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archeological sites if disclosure would jeopardize the resource. This exemption does not apply to requests from the owner of the land upon which the resource is located (§ 2.2-3705.7(10)); and

4. Records of DEQ, the State Water Control Board, State Air Pollution Control Board or the Virginia Waste Management Board relating to (i) active federal environmental enforcement actions that are considered confidential under federal law and (ii) enforcement strategies, including proposed sanctions for enforcement actions. Upon request, such records shall be disclosed after a proposed sanction resulting from the investigation has been proposed to the Director of the agency or his designee. ***This subdivision shall not be construed to prohibit the disclosure of records related to inspection reports, notices of violation, and documents detailing the nature of any environmental contamination that may have occurred, or similar documents*** (§ 2.2-3705.7(16)). See attachment E for supplemental enforcement guidance.

Exclusions regarding criminal records (§ 2.2-3706):

1. Complaints, memoranda, correspondence, case files or reports, witness statements, and evidence related to a criminal investigation or prosecution, other than criminal incident information as defined in § 2.2-3706, subsection A (§ 2.2-3706.F.(1)).

Exclusions to any other records which may be withheld from mandatory disclosure under § 2.2-3705.1- .7 and § 2.2-3706:

DEQ shall honor the confidentiality determinations of other governmental agencies of the Commonwealth or of agencies of federal or local government only if confidentiality is required by state or federal law. If another agency transmits to DEQ a record which that agency has exempted from disclosure but which is not required to be kept confidential under law, DEQ shall make its own determination of whether the record in question qualifies for an exemption before exempting that record from disclosure.

C. **What must be withheld:**

1. The VFOIA does not mandate the withholding of any public record. Some records subject to mandatory withholding fall under other laws or regulations as follows:

a. The Air Pollution Control Law states that any information, **except emission data**, as to secret processes, formulae, or methods of manufacture or production shall be kept confidential (§§ 10.1-1314 and 1314.1). The Regulations for the Control and Abatement of Air Pollution further articulate this principle (9 VAC 5-170-60, "Availability of Information"), and it is the responsibility of the source providing confidential information, not that of DEQ, to identify the information as confidential and seek DEQ's acquiescence in that designation. DEQ is responsible for keeping such designation confidential;

b. The Water Pollution Control Law states that any information, **except effluent data**, as to secret formulae, processes, or secret methods shall be kept confidential (§ 62.1-44.21). It is the responsibility of the source providing confidential information, not that of DEQ, to identify the information as confidential and seek DEQ's acquiescence in that designation. DEQ is responsible for keeping such designation confidential;

c. DEQ will withhold information claimed confidential [U.S. Code Title 42, Subchapter III, Section 11044(a)] to the extent required by the Superfund Amendments Reauthorization Act (SARA) Title III statute;

d. DEQ will withhold the social security number or other identification numbers appearing on driver's licenses or information on credit cards, debit cards, bank accounts, or other electronic billing and payment systems that were supplied to the agency for the purpose of paying fees, fines, taxes or other charges collected by DEQ. The prohibition shall not apply where the disclosure of such information is required (i) to conduct or complete the transaction for which such information was submitted or (ii) by other law or court order (§ 2.2-3808.1); and

e. DEQ will not require an individual to disclose or furnish his social security account number not previously disclosed or furnished, for any purpose in connection with any activity, or to refuse any service, privilege or right to an individual wholly or partly because the individual does not disclose or furnish such number, unless the disclosure or furnishing of such number is specifically required by federal or state law (§ 2.2-3808).

f. DEQ will withhold personal information, as defined in § 2.2-3801, including electronic mail addresses, furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information. However, access shall not be denied to the person who is the subject of the record.

g. Communications and materials required to be kept confidential pursuant to § 2.2-4119 of the Virginia Administrative Dispute Resolution Act (§ 2.2-4115 et seq.).

h. Records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of records relating to such transactions shall be governed by the Virginia Public Procurement Act.

i. Those portions of records that contain account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the record. For the purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

2. Certain records deemed confidential, limited distribution, or restricted use by other law or regulation. The custodian should consult with the DEQ FOIA Officer before withholding any information.

3. DEQ will use its best efforts to identify and designate materials it receives as confidential upon adequate prior written notice from the person providing those documents. But in the event of error, and even as to those documents so designated, if DEQ receives a request under FOIA which covers those documents, their exempt or non-exempt status will be examined under the provisions of FOIA itself, as well as any other relevant law by the records custodian, in consultation with the DEQ FOIA Officer, if necessary.

D. Nonexistent records:

No DEQ coordinator is required to create or prepare a particular record if it does not already exist. This includes the need to abstract or summarize information, to provide records if those records do not exist at the time of the request, to provide records that are not in the coordinator's custody at the time of the request, or to convert a record from one form into another. The coordinator, however, shall make a reasonable effort to reach an agreement with the requester concerning the production of the requested records. For electronic databases, the excision of exempt fields of information from an electronic database or the conversion of data from one available format to another shall not be deemed the creation, preparation or compilation of a new public record.

V. PROCEDURES:

A. Records disclosure procedures:

1. Requests for records

If a citizen of the Commonwealth of Virginia wishes to inspect or be provided with copies of any DEQ record, the request should be made to the DEQ FOIA Officer or to one of the DEQ coordinators (see Appendix I). The DEQ FOIA Officer or the coordinator of the requested records may request that he or she issue his or her request in writing. Should the requester decline to make a written request or the coordinator choose to do so, a verbal request shall be accepted. Such requests shall be documented in writing by the coordinator to include the following: name and legal address of the requester, information requested and the date the request was received (Attachment A). This request must be phrased with reasonable specificity (§ 2.2-3704.B). Facsimile and email requests are acceptable; no original signature is necessary for a request to be valid. The request does not have to refer specifically to the VFOIA in order to be covered by the law and by this policy.

2. Responses to requests for records

VFOIA directs that all public bodies and their officers and employees make reasonable efforts to reach an agreement with a requester concerning the production of the records requested. An initial response must be sent to the requesting party within five working days of the agency's receipt of the request. "Forwarding" or "receiving" a FOIA request to or from another division/section/office of DEQ does not change the date for which a response is due. Failure to respond in one of the following ways may be deemed a denial of the request and therefore a violation of the law. Written responses may be made via email to increase the timeliness of responses.

Within five working days after receipt of the request (not counting the date of receipt) by DEQ, the coordinator of the records requested shall respond in writing in one of the following ways:

a. If the cost of providing the records is less than \$10.00, the coordinator shall release the requested records within five working days at no cost to the requester; (sample letter paragraph 2)

b. If the cost of providing the records is \$10.00 or more, the coordinator shall inform the requester of the costs to be recovered in complying with the request and proceed with providing the records; (sample letter paragraph 5)

c. If the cost of providing the records is determined in advance to likely exceed \$200.00, before continuing to process the request, DEQ will require the requester to pay a deposit, not to exceed the amount of the estimate. This deposit will be credited toward the final cost of supplying the requested records. The response period within which DEQ shall respond under this section shall be tolled for the amount

of time that elapses between notice of the advance determination and the response of the requester. Upon receipt of the deposit, the coordinator shall process the request and proceed with providing the records; (sample letter paragraph 9)

d. If the coordinator determines that it is not possible to provide the requested records, to determine the specific records requested, or to determine the cost of releasing the records within the five working-day period, he or she shall specify in writing the conditions that make a response impossible. The coordinator shall have an additional seven working days in which to provide one of the previous responses or make records available for inspection if acceptable to the requester; (sample letter paragraph 6)

e. If the coordinator determines that the volume of the requested records is extraordinary; an extraordinarily lengthy search would be required to identify the records; or that their release within the additional seven working days would prevent his or her division, region or office from meeting its operational responsibilities, he or she shall call the requester and attempt to reach an agreement on an extension of the time limit. If such an agreement can be reached, the coordinator shall send the requester a letter confirming the arrangement. If such an agreement cannot be reached, the DEQ FOIA Officer shall discuss with the OAG the possibility of petitioning an appropriate court for additional time in which to respond. Any such discussion with the OAG must be held within sufficient time for any such petition to be filed before the statutory deadline expires and default occurs; (sample letter paragraph 7)

f. **If the coordinator deems all or part of the requested records to be subject to *mandatory* withholding under section IV C of this policy, the requester shall be notified. The requester shall be provided with a list of the withheld documents, and the specific exemption which is claimed as to each category must be cited;** (sample letter paragraph 3 or 4)

g. **If the coordinator deems all or part of the requested records to be subject to *discretionary* withholding under IV B of this policy, or is unsure as to the appropriate action, he or she shall immediately consult with the DEQ FOIA Officer.** If necessary, the DEQ FOIA Officer shall contact the Director (or his designee), and the OAG to ascertain the appropriate course of action. If all or parts of the requested records are determined to be subject to withholding, the coordinator shall so inform the requester. **The requester shall be provided with a list of the withheld documents and the specific exemption, which is claimed as to each category must be cited.** The coordinator shall release that portion of the requested records not subject to withholding. (sample letter paragraph 3 or 4)

h. If the requested records could not be found or do not exist in DEQ files, the coordinator shall so inform the requester. However, if the staff person or coordinator who received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

(sample letter paragraph 8). In the event DEQ has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, DEQ shall remain the custodian of such records for purposes of responding to requests for records and shall be responsible for retrieving and supplying such records to the requester. This ownership and responsibility shall not apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia shall be the custodian of such permanently archived records and shall be responsible for responding to requests for such records.

Any DEQ employee who receives a request for records which are in the physical possession of his or her division, region or office shall **immediately** route that request to the appropriate DEQ FOIA coordinator of the records for that division, region or office. Any DEQ employee who receives a request for records which are not in the physical possession of his or her division, region or office shall **immediately** route that request to the attention of the DEQ FOIA Officer or the appropriate coordinator, if known.

If the requester is not a citizen of Virginia, the response will explain that although the legal requirements of the VFOIA do not apply, it is DEQ's policy to respond to such requests within a reasonable time. In the case of an out-of-state firm representing a Virginia client, the coordinator will treat the request as one from a citizen of the Commonwealth.

The coordinator shall maintain a copy of the response cover letter or record of electronic response for at least three years following the date of the letter, as required by General Records Retention and Disposition Schedule No. 101 of the Virginia State Library and Archives. The attachments do not need to be maintained in the same file as the cover letter as long as they can be clearly identified in the cover letter and can be readily retrieved.

3. Form of release of requested records

a. Inspection of records

If the requester wishes to inspect the original records, he or she may do so during the regular working hours of the coordinator of those records at a time mutually agreed upon by the requester and the coordinator. The coordinator shall contact the requester confirming the arrangement and document appropriately. The coordinator is not obliged to allow a requester to inspect records during an unannounced visit. The coordinator shall take all necessary precautions for the preservation and safekeeping of the records while they are being inspected, assigning an employee to monitor the inspection, if necessary. If the citizen wishes copies made of any of the inspected records, the coordinator may make such copies available according to the provisions specified below. The coordinator is not required to provide the requester with copies of the records at the time of the inspection visit. In the spirit of

open government and good customer service, DEQ staff may be willing to discuss with a requester the agency's policies and procedures as well as the laws and regulations it is charged with enforcing; however, under VFOIA no DEQ employee is required to interpret, describe, summarize or answer questions for or from the requester or to any other person regarding the purpose or contents of any record produced for inspection or copying.

b. Copies of records

If the requester does not wish to inspect the original records but wishes to be provided with copies of the requested records, the requester may arrange to produce his own copies. However, steps must be taken to ensure that the integrity of the original records is retained. If the custodian and requester agree, the coordinator will make copies of such records available within the statutory time limits, or an agreeable time.

The coordinator is not required to have the records delivered to the requester by any means (mail, courier service, facsimile transmission, email, etc.) but may do so at his or her discretion. If the coordinator chooses not to have the records delivered to the requester, it shall be the requester's responsibility to obtain the records from the coordinator.

c. Request for large volumes of records

For large volume requests, the agency suggests that the requester inspect the records first. This would help to eliminate unwanted records by ensuring that the requester is receiving and paying for only the records asked for, resulting in a possible cost savings to the requester. If the records are voluminous, the agency may fulfill its obligations by allowing the requester to contract with a private copying service to produce the requested records. In such instances, however, steps must be taken to ensure that the integrity of the original records is retained. If a private copying service is used, direct payment to the company is the responsibility of the requester and the cost per page will not be assessed by DEQ. DEQ now has the option of VITASHARE, a system intended to provide an enhanced form of email based communication which permits very large files to be exchanged and downloaded. The design of this system supports rapid and simple one-time large file exchanges. VITASHARE should be used for files over 10MB since most email systems will not permit the attachment of files over this size.

4. Costs for provision of records

DEQ may make reasonable charges for its actual costs incurred in accessing, duplicating, supplying, or searching for the requested records. DEQ shall not impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the agency.

The policy of recovering the costs associated with responding to FOIA requests will typically not be applied to other government agencies. However,

DEQ reserves the right to seek reimbursement or make other arrangements when costs become onerous.

Before processing a request for records, the coordinator shall require the requester to pay any amounts owed to DEQ for previous requests for records that remain unpaid 30 days or more after billing.

Each DEQ coordinator shall recover the costs of providing the requested records when that cost is \$10.00 or more. This policy is designed to offset actual costs incurred by DEQ in processing responses to information requests and is not necessarily full cost recovery. This cost includes accessing, duplicating, supplying or searching for the requested records. The coordinator shall calculate the cost for complying with each request (Attachment A) and shall maintain that calculation in his file along with the request. It is incumbent upon the coordinator to accurately calculate the cost of preparing the response. When reimbursement is requested, a copy of **Attachment A** shall be sent to DEQ's Fiscal Office.

Requesters shall be encouraged to reimburse DEQ by check rather than cash. Cash payments can be accepted at the discretion of the Director, Regional Director or their designees. Checks should be made payable to the **Treasurer of Virginia** and mailed to the Department of Environmental Quality, Receipts Control, Post Office Box 1104, Richmond, Virginia 23218, or the appropriate regional office. In instances where the estimated cost of providing records exceeds \$200, the Receipts Control office shall notify the FOIA coordinator when the entire estimated payment has been received, after which the coordinator will process and release the requested records. In instances where the estimated cost is less than \$200, the Receipts Control office shall notify FOIA coordinators of receipt of payment for the coordinators' files.

a. Photocopied records

DEQ's basic charge for photocopying existing paper records is (see Appendix II) per 8 1/2" x 11" page. When the request involves hundreds of pages, the staff may estimate the pages using the formula, 2 inches equals 500 pages (1 inch equals 250 pages, etc.) which is based on the standard size of a ream of paper. This charge includes the cost of materials, equipment, and equipment maintenance. The cost of staff time expended in searching for, copying, and assembling the records is calculated separately and added to the basic charge, if applicable.

The cost of packing and postage, if applicable, is also calculated separately and added to the basic charge.

b. Facsimile charges

DEQ's charge for providing records via facsimile is (see Appendix II) cents per page.

c. Technical staff time

DEQ's charge for providing computer data, except ECM, which involves applying knowledge of database software and record structure, including the ability to establish filters and parameters and query one or multiple databases to retrieve specific records that meet the search criteria is (see Appendix II) per half-hour, with any portion of a half-hour being charged at the full, half-hour rate. This is based on the average technical position salary.

If a database containing DEQ data is owned and operated by a consultant under contract to DEQ, the charge for providing the computer data in either electronic form or paper format is the cost to DEQ charged by the consultant.

d. Administrative staff time

DEQ's charge for administrative staff time involved in retrieving, copying and assembling records pursuant to an information request shall be (see Appendix II) per half-hour. This rate is based upon the average salary for classified administrative support staff and is defined as ministerial duplication of original records or copy of a record by copier machine or to a CD or email via scanner. It may also include retrieval from internal, on-line file system (ECM) through searches with parameters specified by the requester. The time shall be determined in half-hour increments. This charge includes the actual cost of materials, equipment, equipment maintenance and staff time expended in searching for, compiling and printing the records or copying them onto a diskette. No staff time will be charged for the redaction of records or parts of records.

B. Assignment of records disclosure responsibilities

1. Custodians

a. Each director of a DEQ division or region is the *ex officio* custodian for the records in the physical possession of his or her division, region or office.

b. The Director of Administration is the custodian for DEQ records that do not fall under any of DEQ's divisions, regions or offices.

c. Each division and region *ex officio* custodian shall designate a coordinator and an alternate coordinator for his/her respective division, region or office to track requests that are received by that office to ensure compliance with the VFOIA and with DEQ policy, and consult with DEQ's FOIA Officer as needed. This designation shall be in writing and shall be filed with the DEQ FOIA Officer.

d. Each employee is custodian of records, both paper and electronic, in his or her possession.

e. No custodian shall either disclose or withhold records subject to discretionary disclosure under Part IV B without prior consultation with the DEQ FOIA Officer.

2. Coordinators

a. Each coordinator shall receive information requests appropriate for their respective division, office or region.

b. Each coordinator shall track all received information requests to ensure compliance with the VFOIA.

c. Each coordinator shall maintain a file of the information requests that they received and responded to, including the tracking system.

d. Each coordinator shall notify the VFOIA Officer of any failure to adhere to the VFOIA.

3. DEQ FOIA Officer

The DEQ FOIA Officer shall be appointed by the Director. DEQ's FOIA Officer shall perform the following functions:

a. Update this policy as necessary in accordance with changes made by the Virginia General Assembly to the VFOIA or with other changes;

b. Maintain a complete written record of DEQ's custodians, coordinators and alternate coordinators for VFOIA purposes;

c. Provide copies of DEQ's VFOIA policy to all appropriate state boards and DEQ custodians as necessary;

d. Report to the Director instances of non-timely response, unauthorized denial of access, or other violations of law or policy;

e. Consult with the Director and, when necessary, the OAG to ascertain the appropriate course of action when the custodian deems all or a part of a requested set of records to be subject to discretionary withholding; and

f. Coordinate responses for multi-regional and multi-program requests to ensure compliance with the Virginia Code and related DEQ policies.

4. All DEQ employees

FOIA responses are time sensitive and required by law. If a FOIA is forwarded to you in error, inform the FOIA coordinator *IMMEDIATELY*. If, however, a FOIA request is appropriately forwarded to your division, section or office, then it is your responsibility to answer the request within the time lines established by the Virginia Freedom of Information Act and DEQ policy.

Every DEQ employee shall adhere to the procedures established in this policy and shall assist his or her custodian in complying with the provisions of the law.

Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of the FOIA (§ 2.2-3704.E).

Any deviation to this policy must comply with the VFOIA and have prior approval of the DEQ FOIA Officer.

C. Penalties for violation

Employees may be held personally responsible for violations of the Virginia Freedom of Information Act. The legal consequences for a DEQ employee's violation of the VFOIA are potentially severe, since any citizen denied his rights under the VFOIA has ready access to the courts via petition of mandamus or injunction. If a proceeding is commenced against any officer or employee of DEQ for a violation of the VFOIA and the court finds that a violation was willfully and knowingly made, the court shall impose upon such officer or employee of DEQ a civil penalty of not less than \$500 nor more than \$2,000, which amount shall be paid into the State Literary Fund. For a second or subsequent violation, such civil penalty shall be not less than \$2,000 nor more than \$5,000 (§ 2.2-3714).

VI. RESCISSION:

This document rescinds Agency Policy **4-2009** and supersedes any previously issued documents except for regulations relative to this matter.

Approved: _____ Date: _____
Chief Deputy, DEQ

ATTACHMENTS

VIRGINIA FREEDOM OF INFORMATION ACTION FORM

1. DEQ COORDINATOR: _____ 2. PHONE NO.: _____ 3. FAX NO.: _____
PLEASE PRINT

4.

REQUESTER	
COMPANY	
ADDRESS	
PHONE NO.	VA CITIZEN OR REPRESENTING VA COMPANY? YES OR NO

5. INFORMATION REQUESTED TO REVIEW AND/OR COPY (INCLUDE NAME, ADDRESS, PERMIT/ID NUMBERS):

<p>6. DATE REQUEST RECEIVED OR FORM COMPLETED:</p> <p>Verbal/phone: _____</p> <p>Written: _____</p> <p>7. DATE RESPONSE DUE: _____ (5 working days after receipt)</p> <p>8. DATES OF RESPONSES: _____ (INITIAL) _____ (FINAL)</p> <p>NUMBER OF DAYS TO RESPOND: (ATTACH RESPONSE LETTER, EMAIL OR FAX CONFIRMATION, ETC.)</p> <p>9. EXTENSION REQUESTED: YES _____ NO _____ REFERRED: YES _____ NO _____</p> <p>WITHHELD INFORMATION: YES _____ NO _____ REASON:</p> <p>10. VISIT (CIRCLE ONE): SCHEDULED OR UNSCHEDULED</p> <p>DATE: _____ TIME: _____</p> <p>11. IF NO REIMBURSEMENT, NO. OF PAGES: _____</p>	<p>12. REIMBURSEMENT - (CHECKS PAYABLE TO: TREASURER OF VIRGINIA)</p> <p>NO. PAGES _____ X _____¢ (SINGLE-SIDED)=</p> <p>NO. FAX PAGES _____ X _____¢ =</p> <p>NO. ½ HRS ADMINISTRATIVE STAFF TIME _____ X \$_____ =</p> <p>NO. ½ HRS TECHNICAL STAFF TIME _____ X \$_____ =</p> <p>EMPLOYEE NAME(S):</p> <p>OTHER SUPPLIES:</p> <p>POSTAGE/SHIPPING: _____ =</p> <p>TOTAL REIMBURSEMENT REQUIRED =</p> <p>COST CODE _____ FUND _____</p> <p>PROGRAM _____</p> <p><u>FISCAL OFFICE INFORMATION</u></p> <p>DATE _____ CHECK NO _____</p> <p>AMOUNT _____ RCD. BY _____</p>
---	--

MY SIGNATURE ACKNOWLEDGES THAT DEQ HAS ATTEMPTED TO PROVIDE ME WITH ALL OF THE AVAILABLE INFORMATION.

13.

REQUESTER'S SIGNATURE/DATE (OFFICE VISIT)	DEQ EMPLOYEE'S SIGNATURE/DATE
	DEQ REVIEWER'S INITIALS _____

RESPONSE DOCUMENTATION

DATE: _____

DATE: _____

DATE: _____

DATE: _____



Attachment B

VIRGINIA FREEDOM OF INFORMATION ACT RESPONSE FORM

DATE:

Dear _____:

The Department received your Freedom of Information request on _____. In order to respond to your request in an expeditious manner, we have developed this form letter for our use.

_____ Some/all of the records you have requested are not physically located at this office. Your response has been forwarded to the following departmental custodian for a response:

Custodian:

Phone No.

-
- Please feel free to contact the custodian if you have any questions or wish to discuss your request in further detail. Any additional action by this office will be indicated below.
- _____ The Department has reviewed your request and determined it is not specific enough for us to identify exactly what records you are requesting. Please submit a new request, specifying exactly what records you would like to receive/inspect.
- _____ Attached please find the records you requested. Because the time expended and the number of copies were minimal, there were no costs associated with providing you these records.
- _____ The Department has conducted a review of our files and determined the records you requested cannot be found or do not exist in DEQ files.
- _____ The Department reviewed our files and determined there are approximately _____ records available. Because of the volume of material, we are requesting you visit the office to evaluate the records. You may then copy any records you would like, and any associated charges will be in accordance with our reimbursement policy.
- _____ The Department's policy is to recover the cost of providing records, when that cost is

\$10.00 or more (administrative staff time @ \$____ per half hour, including accessing, duplicating, supplying and searching for the requested records, five cents per page and \$____ per half hour for technical staff time, researching and retrieving electronic data). We have processed your request and estimated that our cost in providing the requested records to you will be approximately \$_____. Our invoice is enclosed. If you wish us to mail the requested records, please contact me regarding additional charges.

___ It has been determined that the cost of fulfilling your request is likely to exceed \$200.00; therefore, DEQ will require payment in the full amount of the estimate, which is \$_____, before processing your request. Upon completion of processing your request, any payment due will be billed, and any overage paid will be refunded to you.

___ We are currently processing your request. As a practical matter, it is not possible for us to provide the requested records within five (5) working days due to _____. We anticipate, however, that we will be able to do so by _____ (date not to exceed twelve (12) working days after receipt of request).

___ Pursuant to our telephone conversation on _____, we have been unable to process your request as anticipated. As agreed in our discussion, we should be able to release the records by _____.

___ The Department has elected to withhold specific records from release. A list of the records withheld and the statutory grounds for withholding is attached. Please find the releasable records enclosed.

___ Your request to visit our office to inspect records subject to VFOIA has been confirmed. Following is the agreed upon date and time:

Date: _____ Time: _____

You may copy any records you would like, and any associated charges will be in accordance with our policy.

___ Your payment has been received, and the records you requested are enclosed.

___ It has been noted that you/your company has an unpaid balance of \$_____. owed to DEQ for previous fulfillment of FOIA request(s); therefore, we cannot proceed with this request until the balance has been paid in full.

___ Other: _____

It should also be noted that the VFOIA pertains only to records requested by citizens of the Commonwealth of Virginia or their representatives, representatives of newspapers and magazines with circulation in the Commonwealth and representatives of radio and television stations broadcasting in or into the Commonwealth. However, it is DEQ's policy to respond to all such requests within a reasonable time.

I am the (*region or division*) coordinator of records. If you have any questions, please do not hesitate to contact me at (*email and phone number*).

Very truly yours,

DEQ FOIA Coordinator

Letter Template for Various Responses - choose appropriate paragraphs; all letters should include first and last paragraphs.

Must be mailed no later than five working days after receipt of request

Dear [requester]:

1. Thank you for your request for records made in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq). You have requested records relating to *(describe the records sought by the requester)*.
2. Enclosed are the records you requested. Because the time expended and the number of copies were minimal, there were no costs associated with providing you the records. Therefore, these records are provided to you free of charge.
3. Please be advised that **portions of the records** you have requested relating to *(describe the exempt portions generally)* **are exempt** from disclosure under *(cite specific provision in § 2.2-3705 or other applicable Code of Virginia citation)*. Therefore, these portions have been redacted from the records being released to you.
4. This office has *(describe with reasonable particularity the volume or amount of records being withheld; i.e. 20 pages of records, over 1,000 pages of records, a large database, etc.)* responsive to your request. Please be advised, however, that **these records are exempt** from disclosure under *(cite specific provision in § 2.2-3705 or other applicable Code of Virginia citation)* and therefore will not be released.
5. We have determined that **the cost of providing you** with the requested records will be [\$--]. Our cost invoice is attached. The requested documents will be ready for pickup at *[location/time]*. If you would like the records mailed, please contact me regarding additional charges.* **
6. Please be advised that it is not possible to provide the requested records or determine whether they are available within the five working days required by FOIA because *(specify the conditions that make a five-day response impossible; i.e., voluminous request, insufficient staff this week, several regions/offices involved in the research, etc.)*. Therefore, we are invoking subsection B4 of § 2.2-3704 to provide us with **seven additional working days** to respond to your request.
7. We are unable to release the requested records within twelve working days due to _____. However, as agreed during our conversation on _____, we will be able to do so by _____.
8. DEQ **has no records** responsive to your request. *(Explain the circumstances; e.g., the records do not exist because they were never created by the public body, the records do not exist because they were destroyed according to the retention schedule under the Virginia Public Records Act, the records were destroyed in a flood or fire, the records cannot be*

found, etc.). (If another public body is known to have the requested records, add these lines in a new paragraph).

You may wish to contact (name of contact person) at (name of the public body that has or may have the records). (He/she) may be reached at (telephone number, electronic mail address, or other contact information).

9. It has been determined that the cost of fulfilling your request is likely to exceed \$200.00; therefore, DEQ will require a deposit of the full amount of the estimate, which is \$_____, before processing your request. This deposit will be credited toward the final cost of supplying the requested records and, when the request has been completed, any overage will be refunded and any additional cost invoiced.
10. I am the coordinator of the records that you have requested. Should you have any further questions or requests, please contact me at *(phone and email)*.

Sincerely,

c: DEQ Fiscal Office

A COPY OF ATTACHMENT A (cost invoice) MUST BE SENT TO DEQ'S FISCAL OFFICE ALONG WITH A COPY OF THIS LETTER.

- * If the requester does not pick up the records, the coordinator must inform DEQ's Fiscal Office that there is no balance due.
- ** If the requester no longer wants records because of the cost, the coordinator must inform DEQ's Fiscal Office that there is no balance due (provided that the coordinator has already sent the "invoice" to Fiscal).

CONFIDENTIALITY OF ENFORCEMENT DOCUMENTS

The Virginia Freedom of Information Act (“FOIA”) provides that certain enforcement records of DEQ, the State Water Control Board, the State Air Pollution Control Board, and the Virginia Waste Management Board (collectively, “DEQ Records”) are exempted from mandatory disclosure under FOIA, as follows:

Records of the Department of Environmental Quality, the State Water Control Board, State Air Pollution Control Board or the Virginia Waste Management Board relating to (i) active federal environmental enforcement actions that are considered confidential under federal law and (ii) enforcement strategies, including proposed sanctions for enforcement actions. Upon request, such records shall be disclosed after a proposed sanction resulting from the investigation has been proposed to the director of DEQ. This subdivision shall not be construed to prohibit the disclosure of records related to inspection reports, notices of violation, and documents detailing the nature of any environmental contamination that may have occurred or similar documents. Va. Code § 2.2-3705.7(16)

A. Active Federal Enforcement Actions

Federal documents pertaining to a federal enforcement action and in the possession of DEQ are not subject to disclosure under FOIA if: (1) the enforcement action is active (*i.e.*, ongoing), and (2) the documents are considered confidential under federal law. Whether the documents are considered confidential under federal law is based upon their designation as such by the federal agency or its counsel providing the documents. State documents and data that are otherwise subject to disclosure under FOIA are not made subject to the Active Federal Enforcement Action exemption by virtue of their use or potential use in a federal action.

B. DEQ Enforcement Strategy Documents

FOIA creates a temporary exemption for DEQ Records documenting “enforcement strategies, including proposed sanctions for enforcement actions.” Such documents are exempt from mandatory disclosure under FOIA, but only until “a proposed sanction resulting from an investigation has been proposed to the Director of DEQ.”

For purposes of this statute, “sanctions” refer to any injunctive relief, revocation of a permit or other authorization, civil charges or other monetary penalties authorized by statute that may be imposed against a person or entity in an enforcement action, whether administrative or judicial.

DEQ enforcement strategy documents that are temporarily exempt from disclosure under this provision include, but are not limited to: enforcement recommendation and plan documents (“ERPs”); memoranda, emails and other documents dedicated to the discussion of appropriate enforcement strategy and its progress; documents and proposals drafted and/or received in the course of enforcement action settlement negotiations and pertaining directly thereto; draft orders, including draft findings of fact and conclusions of law; civil charge or civil penalty worksheets and documents prepared as part of the active prosecution of adversarial administrative and judicial enforcement actions.

The language of FOIA specifically excludes certain agency documents from the temporary enforcement strategies exemption. These other documents are expressly or implicitly not exempt as DEQ enforcement strategy. They are open to Virginia citizens in accordance with the statute and this Policy, unless another FOIA exemption applies. These documents include warning letters, notices of violation, inspection reports, documents detailing the nature of any environmental contamination, and other documents, information or compilations created in DEQ’s ordinary course of business.

DEQ enforcement strategy exemption is only temporary, and it ends when “a proposed sanction resulting from an investigation has been proposed to the Director of DEQ.” A sanction is “proposed to the Director of DEQ” or his designee as follows:

- (1) For consent orders that are not subject to public comment – at the presentation of a consent order for final approval and proposed execution by the Director or his designee;
- (2) For consent orders and consent special orders that are subject to public comment – when the Director or his designee approves the order for public comment; and
- (3) For proposed administrative orders resulting from an adversarial administrative proceeding such as a formal hearing or informal fact-finding – at the presentation for final approval and proposed execution of the order by the Director or his designee, following any review requested by the Director or his designee.

After the sanction is proposed to the Director, DEQ enforcement strategy documents are available under FOIA unless another FOIA exemption applies.